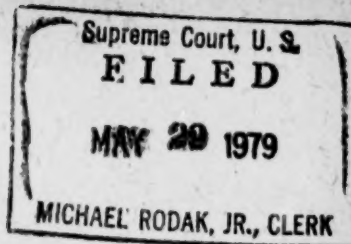


No. 78-1527



In the Supreme Court of the United States

OCTOBER TERM, 1978

**JUAN F. LUNA, A/B/O ISAMELINA LUNA GONZALEZ,
APPELLANT**

v.

**JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH,
EDUCATION, AND WELFARE**

**ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT**

MOTION TO DISMISS

**WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530**

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Appellee moves that the appeal be dismissed for want of jurisdiction. Appellant invokes this Court's jurisdiction under 28 U.S.C. 1252, but that statute applies only when a court has declared an Act of Congress unconstitutional. Appellant's complaint here is that the court of appeals did *not* declare Section 202(d)(8) of the Social Security Act, 42 U.S.C. 402(d)(8), unconstitutional. Section 1252 thus does not provide jurisdiction. The papers whereon the appeal is taken should be treated as a petition for a writ of certiorari. 28 U.S.C. 2103.

Certiorari should be denied. Section 202(d)(8), the object of appellant's challenge, provides that children adopted after their adoptive parent becomes eligible for disability usually are not entitled to children's benefits.

Children born to a wage-earner after the onset of disability are eligible for benefits. As the court of appeals pointed out, however, appellant did not properly preserve any constitutional challenge. His argument on appeal was limited to questions of statutory construction (J.S. App. 9a); he did not raise any constitutional argument until filing a petition for rehearing, and the court of appeals then refused to rule on the point (*id.* at 4a-5a). In these circumstances, the constitutional challenge cannot be raised here. *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977).

At all events, appellant's constitutional argument fails under the standard of *Weinberger v. Salfi*, 422 U.S. 749 (1975). The disqualification of after-adopted children is a prophylactic measure that prevents a potential abuse: adoption for the purpose of creating an entitlement to benefits. The Court held in *Salfi* that such rules are constitutional so long as Congress rationally could have concluded that a prophylactic rule is necessary to guard against abuse. The statute in question here is rational. There is an inevitable potential for abuse in the practice of adopting children after the onset of disability. The statute does not prevent such adoptions; it simply provides that they will not be subsidized.* Cf. *Califano v. Aznavorian*, No. 77-991 (Dec. 11, 1978), slip op. 7-8. The same

*After adopted children are eligible for benefits if they fall into one of three categories that Congress thought posed the least potential for abuse. See 42 U.S.C. 402(d)(8) (eligible children include stepchildren; children living with and supported by the disabled beneficiary for a year before the period of disability begins; grandchildren adopted by a grandparent with whom they lived).

constitutional issue was presented earlier this Term, and the Court denied review. *Williams v. Califano*, cert. denied, No. 77-1533 (Oct. 2, 1978). There is no greater reason to grant review here.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

MAY 1979

DOJ-1979-03